to B. Consent was not obtained, and no assignment of the leasehold was executed, but B., from the time of the dissolution, remained in sole possession:—

Held (affirming the decision of Bacon V.C.), that there had been no breach of the covenant, and that the proviso for re-entry had not come into operation."

Somewhat similar situations with regard to partners were considered in *Feebles* v. *Crosthwaite* [2] and in *Chaplin* v. *Smith* [3] and these cases decided in clear terms that "a lessee who retains possession does not commit a breach of the covenant against parting with possession by allowing other people to use the premises."

I am therefore of opinion that there was no assignment of the sub-tenancy by the first appellant and that the appellants should not have been ordered to vacate the property. In so far as that part of the judgment appealed against is concerned, I would allow the appeal and set aside the order for possession.

There remains the question of the arrears of rent claimed by the respondent and the counter-claim by the first appellant for $875 for excess rent paid.

In his counter-claim the first appellant pleaded that "the plaintiffs had not at any time complied with the provisions of section 6(2) of the Control of Rent (*sic*) of 1948 which was then in force and determined the sub-tenancy prior to increasing the rent."

It was admitted that no prior notice to quit was given, but the sub-tenant through his manager or agent paid, apparently without protest, the twice increased rent. Once from $140 to $175 a month and secondly, from $175 to $200.80. He can therefore only be taken to have agreed to the increases and so relieved his landlord of the necessity of giving him notice to quit.

There appears to be some misconception with regard to section 6(2) of the Control of Rent Ordinance. This sub-section is intended to prevent a landlord from arbitrarily imposing the increased rent permitted by sub-section (1) without first obtaining the tenant's agreement. Where the tenant does not agree notice of termination of the tenancy must be given. The sub-section merely indicates that the normal procedure under the common law with regard to the variation of contracts must prevail in spite of the provisions of sub-section (1).

In my view, therefore, the counter-claim for excess rent should have failed and the respondents should have obtained judgment as prayed for arrears of rent at the rate of $200.80 *per mensem* from 1st February, 1958, to the date of the judgment and I would vary the judgment of the lower Court accordingly.

I think the respondents should pay the costs of this appeal.

Appeal allowed and order for possession set aside. Judgment of lower Court as to counter-claim varied.

Solicitors: *Lovelace & Hastings; Braddell & Ramani.*

HAJI HASNAN v. TAN AH KIAN

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) February 28, 1963]

[K.L. — Civil Appeal No. 57 of 1962]

Contract — Completion of road works by specified date — Non-completion — Termination of contract — Whether time of the essence.

Contract — Breach of contract — Damages — Quantum meruit.

The appellant having obtained a contract to construct roads sub-contracted with the respondent for its performance. The respondent agreed to complete the whole work on or before May 30, 1960. On May 6, 1960 the respondent commenced work and on May 27, 1960 the appellant inspected the work and found it had not been properly done. On May 30, 1960 the appellant terminated the contract and entered into a fresh contract with another person for the completion of the work. The respondent, on June 4, 1960 requested an extension of time to complete the work and on it not being granted brought an action for work done and materials supplied. Judgment having been entered for the respondent as claimed, the appellant appealed:

Held: (1) the nature of the contract or of its subject matter was such that no inference could be drawn that time was of the essence;

(2) accordingly, the appellant was in breach of his contract and the respondent was entitled to recover on the basis of *quantum meruit*.

Decision of Gill J. ([1962] M.L.J. 400) affirmed.

Cases referred to:—

(1) *Stickney* v. *Keeble* [1915] A.C. 386.
(2) *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [1962] M.L.J. 118.
(3) *H. Dakin & Co. Ltd.* v. *Lee* [1916] 1 K.B. 566.
(4) *Planche* v. *Colburn* (1831) 8 Bing. 14.
(5) *Smith Construction Co. Ltd.* v. *Phit Kirivatna* [1955] M.L.J. 8.
(6) *Sumpter* v. *Hedges* [1898] 1 Q.B. 673.

CIVIL APPEAL.

Dato R. P. S. Rajasooria for the appellant.
Robert K. C. Hoh for the respondent.

Cur. Adv. Vult.

Barakbah J.A. (with whom **Thomson C.J.** and **Hill J.A.** agreed): The defendant (appellant on this appeal) obtained a contract from the District Officer, Kuala Selangor, to supply, transport, spread and level, etc. good quality laterite from Batang Berjuntai Quarry for the making of certain stretches of roads in the Tanjong Karang

area and at Pasir Panjang in the District of Kuala Selangor. He then entered into an agreement on 6th May, 1960 (Ex. P 1) with the plaintiff (respondent on this appeal) who undertook to carry out this piece of work and to complete the whole of it within the 30th day of May, 1960.

The respondent commenced work on 6th May, 1960. On 27th of May, appellant inspected the work with the Assistant District Officer, Tanjong Karang and found that it had not been properly done.

On 30th May, he sent a letter (Ex. P 2) to the respondent terminating the contract and on the same day he entered into an agreement with one Kathigesu to complete the work.

On 4th of June, the respondent sent a reply asking for a further ten days in which to complete the work adding that if this was not agreed to, legal proceedings would be commenced against the appellant without further notice. As extension of time was not granted, the respondent filed an action in Court for damages for breach of contract, alternatively for a sum of $4,079.98 for work done and material supplied. On 22nd September, 1962 the trial Judge entered judgment for the plaintiff in the sum of $4,079.98 with 6% interest per annum from the date of the judgment to the date of satisfaction and costs. The appellant was dissatisfied with the decision, hence this appeal.

There were several grounds of appeal but the main issues were as to whether time was of the essence of the contract and whether the plaintiff was entitled under the doctrine of *quantum meruit*.

For the purpose of determining the issues, it is well to state the relevant parts of the agreement (Ex. P.1).

" (3) WHEREAS the Contractor is the lawful person and undertaker who has so undertaken to carry out the undermentioned road work for the District Officer, Kuala Selangor, by respective works indents and particulars shown below.

Supplying, transporting, spreading and levelling, etc. of good quality laterite from Batang Berjuntai Quarry on roads; such work to be in accordance to the specified requirements of the Government on roads:—(as under)

(a) At Sungei Leman, Tanjong Karang, 10 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 18/60

(b) At Sungei Tinggi Kiri, Tanjong Karang, 40 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 18/60

(c) Batu 23, Pasir Panjang, 30 chains long by 8 feet wide by 4 inches thick . . . Vide Indent 19/60

(3) AND WHEREAS the Contractor is agreeing to sub-let his contract work on above mentioned road work to the Sub-Contractor, AND WHEREAS the Sub-Contractor doth hereby agree and undertake to carry out the above works for the Contractor, the conditions and terms attached to and relating to the said work, to be so accomplished by the Sub-Contractor will be as follows:—

(4) The Sub-Contractor:—

a. x x x x

b. WILL commence work on or about Sixth (6th) day of May, 1960, and start first on item (a) above—Sungei Leman road; (b) then afterwards or at the same time commence work on Sungei Tinggi Kiri road work, (c) and for the third he will do the Batu 23, Pasir Panjang road work.

c. WILL complete the whole work comprised by the said items and the corresponding works Indents within the *30th day of May, 1960.*

d. x x x x

e. WILL receive payment from the Contractor on date of completion of each work; subject to the quality of work so carried out is in accordance with the requirements specified in the Indents, and accepted without dispute by the Government.

(5) THE SUB-CONTRACTOR will be provided with service of an Excavator at the Batang Berjuntai Quarry, to do the cutting and loading into Sub-Contractor's lorries, of all the required laterite, without delay caused in time, or other unjustified reasons, AND the cost of this item will be borne by the CONTRACTOR.

ANY neglect or delay caused under this heading by the CONTRACTOR will not render the SUB-CONTRACTOR for any liability, and that he will not be made to suffer for the neglect of the CONTRACTOR.

(6) Special Conditions Applicable to Both Parties hereto

1. PAYMENT TO SUB-CONTRACTOR subject to his carrying out all works as mentioned and narrated in this Agreement.

A. BREACH of contract agreed upon herein by the CONTRACTOR, will render the SUB-CONTRACTOR eligible and entitled to report this matter to the Government Authorities, if necessary, and claim payment for his work direct from the Government.

TO THIS agreement, the CONTRACTOR hereby gives his full consent and promise, which he shall not revoke under any reason.

B. Rate of Payment to the Sub-Contractor:—

Sungei Leman, Tanjong Karang . . . 10 chains roadwork @ $68 (Dollars Sixty-eight only) per chain length Sungei Tinggi Kiri, Tanjong Karang . . . . 40 chains roadwork @ $55 (Dollars fifty-five only) per chain length Batu 23, Pasir Panjang, 30 chains length @ $80 (Dollars Eighty only) per chain."

It was contended by the learned counsel for the appellant that as the agreement stipulated that the whole work should be completed within the 30th day of May, 1960, time should therefore be regarded as of the essence of the contract and failure to comply with it would entitle the appellant to repudiate the contract.

In my opinion the learned trial Judge considered this point carefully. He referred to the three general principles as to time being the essence of the contract. Firstly, time is of the essence of the contract where the parties expressly stipulate in the contract that it shall be so; secondly, time is of the essence of the contract where it was not originally stated to be so, but has been made so by one party by giving reasonable notice to the other, who has failed to perform the contract with sufficient promptitude; thirdly, time is of the essence of the contract where from the nature of the contract or its subject matter time must be taken to be of the essence of the agreement.

The learned trial Judge went on to say in his judgment: "Applying the above principles of law to the agreement in this case, I have no hesitation in saying that time was not of the

essence of the contract ... ... The nature of the contract or of its subject matter was such that it would be wrong to draw an inference that time was of the essence, nor is there any evidence of any attendant or surrounding circumstances from which it can be gathered that it was so. If there were any evidence that it was within the contemplation of the parties that the roads were required for a specific purpose and it was imperative that they should be ready by 30th May, 1960, it would be logical to draw an inference in favour of the defendant". With this view of the learned Judge I respectfully agree. From the evidence of the Assistant District Officer there was no urgency for the completion of the road. On receipt of letter Ex. P 2, respondent sent a letter to the appellant asking for another ten days to complete the work, the delay for the completion being due to high tides and rainy weather. No extension of time was granted and no notice was given to the respondent to complete by a certain date. Had notice been given to the respondent to complete by a certain date then time could have been of the essence of the contract. See *Stickney* v. *Keeble* [1]; *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [2].

Regarding the doctrine of *quantum meruit* it was contended by the counsel for the appellant that no claim could be made on it. He stated that the respondent would not be entitled to more than the contract price of $5,280 less the sum of $4,750 expended by respondent to complete the work, i.e. $530 only. He quoted the case of *H. Dakin & Co. Ltd.* v. *Lee* [3] in which there was a contract to do a considerable amount of work to the defendant's house. What the respondent had done was to perform and complete the work which they had contracted to do, but they had done some part of it insufficiently and badly and it was held that the respondent were entitled to be paid but the appellant could deduct such an amount as was sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

The learned Judge came to the conclusion that the respondent's claim should be decided on the basis of *quantum meruit*. He referred to the case of *Planche* v. *Colburn* [4] where the appellant engaged plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication. *Held*, that respondent might sue for compensation, without tendering or delivering the treatise. I respectfully agree with the trial Judge's views as expressed in his judgment. In *Smith Construction Co. Ltd.* v. *Phit Kirivatna* [5] Spenser Wilkinson J. referred to the unreported case of *Lysaght* v. *Pearson* which was referred to in *Sumpter* v. *Hedges* [6]. He quoted the words of A. L. Smith L.J.:—

> "There the plaintiff had contracted to erect on the defendant's land two corrugated iron roofs. When he had completed one of them, he does not seem to have said that he abandoned the contract, but merely that he would not go on unless the defendant paid him for what he had already done. The defendant thereupon proceeded to erect for himself the second roof. The Court of Appeal held that there was in that case something from which a new contract might be inferred to pay for the work done by the plaintiff."

The present case is distinguished from *Dakin's* case in that the appellant repudiated the contract before the work was completed without giving notice to the respondent to complete by a certain date. Indeed he immediately engaged another contractor to complete the work. The respondent applied for an extension of time to complete which was not granted. From all the circumstances, I am of opinion that there must in this case be an implied contract on the part of the appellant to pay for the work done and therefore the respondent is entitled to recover the full amount of the work and labour done and material supplied. In his judgment the trial Judge has carefully considered the case in every aspect and in my view he has come to the right conclusion. I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *R. P. S. Rajasooria; Eugene Lye & Hoh.*

PAY ENG KEE v. RAMASAMY

[C.A. (Wee Chong Jin C.J., Tan Ah Tah and Buttrose JJ.) March 27, 1963]

[Singapore — Civil Appeal No. 3 of 1963]

Damages — Measure of damages — Service pension — Exclusion in assessment.

Practice and Procedure — Assessment of damages in negligence cases — Counsel agreeing on law — Precedent not followed since judgment — Appeal — Whether point open to appellant.

In an action which concluded on November 6, 1962 for damages for injuries sustained in an accident, counsel for both the plaintiff and the defendant agreed that in the assessment of damages, a pension received by the plaintiff as a result of the accident was not to be taken into account. The agreement was apparently reached in the light of the existing state of the law as declared in *Payne* v. *Railway Executive* [2]. On November 20, 1962, *Payne's* case was not followed by the English Court of Appeal in *Browning* v. *War Office* [1]. The defendant appealed on the ground that by reason of the decision in *Browning's* case, the pension receivable by the plaintiff ought to be taken into consideration in reduction of the quantum of damages awarded to him.